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No. 645

In the Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES OF AMERICA, PETITIONER

v.

D. B. HEILAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on October 29, 1943, affirming the judgment of the United States District Court for the Northern District of Oklahoma in an action to quiet title based on a deed acquired at a partition sale of an Indian allotment.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 33–37) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 29, 1943 (R. 38). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether full-blood Indians of the Five Civilized Tribes can be divested of title to a restricted allotment of land by a sale in a partition proceeding to which the United States is not a party.

STATUTE INVOLVED

Section 2 of the Act of June 14, 1918, 40 Stat. 606 (25 U. S. C., sec. 355) provides:

> That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

STATEMENT

A 160-acre tract of land was allotted to a full-blood Creek Indian (R. 4, 21, 24) subject to

Section 1 of the Act of May 27, 1908, 35 Stat. 312, which provided that lands allotted to full-blood Indians of the Five Civilized Tribes should be inalienable prior to April 26, 1931, except that the Secretary of the Interior might remove restrictions in whole or in part under such rules and regulations as he might prescribe. The restriction or alienation was extended to April 26, 1956, by Section 1 of the Act of May 10, 1928, 45 Stat. 495; and the land was selected and certified as tax-exempt under Section 4 of that Act. Upon the death of the allottee in 1938, the land descended in equal shares to her son, grandson, and great-granddaughter. The son died, and his share passed to his widow and four children. (R. 22.) All of the heirs were also full-blood Creek Indians (*ibid.*), and they inherited the land subject to Section 9 of the Act of May 27, 1908, 35 Stat. 312, as amended April 12, 1926, 44 Stat. 239, and continued in force May 10, 1928, 45 Stat. 495, which prescribes that the death of an allottee shall operate to remove all restrictions on alienation of the allottee's land provided that no conveyance thereof by any full-blood Indian heir shall be valid unless approved by the county court having jurisdiction of the settlement of the deceased allottee's estate (R. 28).

On March 20, 1940, the heirs instituted proceedings in the District Court of Creek County, Oklahoma, to partition the allotment (R. 23).

The United States was not a party to the suit, nor was notice of the pendency thereof served upon the Superintendent for the Five Civilized Tribes under Section 3 of the Act of April 12, 1926, 44 Stat. 239 (R. 11–15).[1] On June 24, 1940, a judgment of partition was entered therein, and pursuant to that judgment the land was sold and a sheriff's deed in partition was issued to D. B. Hellard (R. 23).

On July 5, 1941, D. B. Hellard filed the present action in the District Court of Creek County, Oklahoma, against the Indian heirs to quiet his title founded on the deed in partition (R. 4–7). The heirs filed an answer disclaiming any interest in the land (R. 10–11). Hellard caused notice of the pendency of the suit to be served upon the Superintendent for the Five Civilized Tribes (R. 9), and at the instance of the United States the case was removed to the federal district court, all pursuant to Section 3 of the Act of April 12, 1926, 44 Stat. 239 (R. 11–15). After removal, the United States filed a complaint in intervention, alleging that the partition proceedings in the District Court of Creek County, Oklahoma, were void for lack of the United States as a party and

[1] This Section, reproduced in the Appendix, *infra*, provides for notice to the United States of suits in the federal or state courts involving title to or an interest in the restricted lands of Five Tribes Indians and the removal of state court suits to the federal courts at the option of the United States.

praying that the sheriff's deed in partition be set aside and title quieted in the full-blood Indian heirs (R. 17–19). Hellard answered, denying that the United States was an indispensable party and alleging that the partition proceedings were valid and binding (R. 20–21).

The district court held that the partition proceedings were valid even though the United States was not a party thereto and on October 30, 1942, entered its findings of fact, conclusions of law, and judgment quieting title in D. B. Hellard (R. 24–31). On October 29, 1943, the circuit court of appeals affirmed (R. 38).

REASONS FOR GRANTING THE WRIT

1. Allotments such as the one here involved are subject to restrictions on alienation under Section 1 of the Act of May 27, 1908, 35 Stat. 312, as extended by Section 1 of the Act of May 10, 1928, 45 Stat. 495, and Section 9 of the Act of May 27, 1908, as amended by Section 1 of the Act of April 12, 1926, 44 Stat. 239, and continued in force by Section 2 of the Act of May 10, 1928, 45 Stat. 495. Cf. *Parker* v. *Richard*, 250 U. S. 235. Because of those restrictions, such allotments are property in which the United States has an interest. Cf. *Heckman* v. *United States*, 224 U. S. 413; *Bowling & Miami Investment Co.* v. *United States*, 233 U. S. 528; *Privett* v. *United States*, 256 U. S. 201; *Sunderland* v. *United States*, 266

U. S. 226.[2] Any proceeding against property in which the United States has an interest is a suit against the United States, and the United States is an indispensable party thereto. *Minnesota* v. *United States,* 305 U. S. 382. While Congress, by Section 2 of the 1918 Act (*supra,* p. 2), has authorized the bringing of partition actions against restricted allotments by making them "subject to the laws of the State of Oklahoma, providing for the partition of real estate," it has not thereby consented to the maintenance of such actions in the absence of the United States.

Section 2 of the 1918 Act (*supra,* p. 2) does not remove restrictions from restricted allotments unless and until the land is sold at partition sale, an exception designed only to afford a marketable title to purchasers at partition sales. Inasmuch as the allotments remain restricted, at least until after the entry of the decree, the interest of the United States exists throughout partition proceedings. It lies in representing the Indians in such proceedings in the selection and appointment of commissioners; in the obtaining

[2] In the *Bowling* case, the Court said (233 U. S. at 534–535):

"It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the Government is a stranger, can affect its interest. * * *"

of partition in kind if feasible, in conformance to its general policy to preserve for the Indians their restricted lands; and where the property is ordered sold, in protecting the right of the Indian to elect to take at the appraised value or in soliciting for prospective bidders, so that the best possible price may be obtained. The United States is also interested in having the proceeds of these sales retained under federal supervision; and where the land is tax-exempt as well as restricted, as it is in this case (R. 22), in effectuating the authority of the Secretary of the Interior under the Act of June 30, 1932, 47 Stat. 474 (25 U. S. C. sec. 409a) to determine that the proceeds shall be reinvested in other lands subject to the same restrictions. It is interested, too, in making it possible for the Secretary of the Interior to exercise the preferential right to purchase the land at the sale, under the Act of June 26, 1936, 49 Stat. 1967. See 25 Code of Federal Regulations, sec. 241.13. Hence, the decision below is incorrect in holding that the United States was not a necessary party to the partition proceedings here involved, for otherwise the policy of the law which imposed the restrictions would be frustrated.

2. The decision below conflicts with *Minnesota* v. *United States*, 305 U. S. 382, holding that the United States is an indispensable party to condemnation proceedings under Section 3 of the

Act of March 3, 1901, 31 Stat. 1058, 1083–1084 (25 U. S. C. sec. 357) which provides in part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Just as the United States is interested in and is an indispensable party to condemnation proceedings against restricted Indian lands, it is interested in and is an indispensable party to partition proceedings.[3] The statute authorizing partition "subject to the laws of the State of Oklahoma" does not diminish the interest of the United States, or remove the restrictions, any more than the statute permitting condemnation "under the laws of the State or Territory."

The court below sought to distinguish the *Minnesota* case on the ground that the 1918 partition statute, but not the condemnation Act there involved, contemplated suits in the state courts, and that "the interests of the United States are entrusted to an instrumentality of its own choice—the district court of the state" (R. 36). Although Congress did intend to vest the state courts with

[3] In the *Minnesota* case, the United States owned the fee, but Mr. Justice Brandeis' opinion makes it plain that this was not a crucial factor (305 U. S. at 386, fn. 1).

jurisdiction over partition matters,[4] whereas the practice in condemnation proceedings had been to proceed in the federal courts,[5] the language of the two Acts does not suggest any differentiation in this respect, and certainly does not warrant the conclusion that the United States was to be deprived of its right to protect its interests in the one case any more than in the other. The grant of jurisdiction to the state courts does not make them, any more than are the federal courts in suits involving the Indians, the representatives of the United States in protecting the Indian wards. The functions of the courts in each instance are judicial, and there is no basis for assuming that the state judges in partition proceedings have succeeded to the functions of the United States or the Secretary of the Interior. The latter, for example, alone has power to determine whether the proceeds of a partition sale shall be retained under federal supervision and whether his preferential right of purchase shall be exercised (see p. 7, *supra*).

Except as to forum, Section 2 is thus similar to the statute involved in the *Minnesota* case, and the forum affords no basis for depriving the United States of its right to perform its function of safeguarding the interests of the Indians.

[4] See H. Rep. No. 392, 65th Cong., 2d sess.; S. Rep. No. 330, 65th Cong., 2d sess.; 56 Cong. Rec. pp. 7317–7319.

[5] *Minnesota* v. *United States*, 305 U. S. at 389–390.

The condemnation and partition statutes differ from those relied upon by the Circuit Court of Appeals. The United States is not a necessary party where state courts are authorized to determine who are heirs of deceased Indian allottees, inasmuch as the restrictions on alienation do not prevent inheritance (Act of June 14, 1918, sec. 1, 40 Stat. 606; cf. *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401, 413–414), and the function of the state courts in approving conveyances by Indian heirs (Act of May 27, 1908, 35 Stat. 312, as amended April 12, 1926, 44 Stat. 239) is supervisory, and in such proceedings other methods of protecting the interests of the United States have been provided.[6]

The circuit court of appeals asserts (R. 36) that when the statute in question was enacted, "there was no way under general law in which the United States could be joined in an action of that kind in the state court" and that the legislation should be construed in a manner "which will give it vitality from its inception." But, as in the *Minnesota* case, consent to be sued is the necessary implication of consent to the bringing of partition proceedings, and the United States may be joined in the normal way, *viz*, by service of process upon the United States Attorney and the At-

[6] See Act of January 27, 1933, sec. 8, 47 Stat. 777, providing for the appearance of United States probate attorneys to protect the Indians' interests; cf. *Winton* v. *Amos*, 255 U. S. 373, 392.

torney General. That the forum is a state court is no obstacle. Section 3 of the Act of April 12, 1926, 44 Stat. 239 (see Appendix, *infra*), provides a further method of bringing in the United States, and in addition affords the United States a choice of forum.

3. Partition proceedings under the 1918 Act are ordinarily brought to the attention of the Government by service of notice as provided in Section 3 of the Act of April 12, 1926, 44 Stat. 239 (see Appendix, *infra*). The United States then removes the cause to the federal court, files a complaint in intervention, and participates fully in the partition proceedings. In such cases, the Government is able fully to protect its interest in the allotment, *e. g.*, to see that the proceeds of partition sales are retained under federal supervision. Recently, however, a number of instances have occurred where partition proceedings are instituted in the state court with the United States neither being joined as a party nor served with notice under the 1926 Act, and thereafter a suit to quiet title, based upon the deed obtained as the partition sale is commenced, with notice served under the 1926 Act. In this manner, by instituting two suits and serving notice in the second only, the presence of the United States in the partition case avoided, and the United States is deprived of its opportunity to participate in the determination of matters essential to its protec-

tion of the Indians' rights (see pp. 6–7, *supra*). The decision below will have the effect of upsetting the present customary practice, under which the United States has been given notice of partition proceedings pursuant to the 1926 Act and thus has had an opportunity fully to protect its interests. The court below does not deny that this will be the consequence of its decision, but suggests that the remedy lies with Congress. (R. 37.) The Government believes that under the doctrine of the *Minnesota* case the United States is an indispensable party to partition proceedings and therefore remedial legislation is not required.

The issue presented by this case is involved in several pending cases and will, of course, affect many future partition proceedings.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

JANUARY 1944.

APPENDIX

Section 3 of the Act of April 12, 1926, 44 Stat. 239, provides:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in

the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action, or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: *Provided,* That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the de-

fendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

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